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OFFICE OF THE
EXECUTIVE SECRETARY

May 15, 2000

David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

Via Hand Delivery

RE: Petition for Arbitration of the Interconnection Agreement Between BellSouth
Telecommunications, Inc. and Time Warner Telecom of the Mid-South, L.P. Pursuant to
Section 252(b) of the Telecommunications Act of 1996; Docket No. 99-00797

Petition for Arbitration by ITC^DeltaCom Communications, Inc. with BellSouth
Telecommunications, Inc., Pursuant to the Telecommunications Act of 1996; Docket No.
99-00430

Petition of NEXTLINK Tennessee, LLC for Arbitration of Interconnection Agreement withj
BellSouth Telecommunications, Inc.; Docket No. 98-00123

Dear Mr. Waddell:

Enclosed for filing in the above-referenced dockets are the original and 16 copies of the joint
Response to BellSouth Telecommunications, Inc.'s Motion for Clarification.

A copy has been furnished to BST's local counsel.

Thank you for your assistance. Please contact me if you have any questions.

Sincerely,



H. LaDon Baltimore
LDB/dcg
Enclosures

cc: Guy Hicks, Esq.
Henry Walker, Esq.
Charles B. Welch, Jr., Esq.

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OFFICE OF THE
EXECUTIVE SECRETARY

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: Petition for Arbitration of the)
Interconnection Agreement between BellSouth) Docket No. 99-00797
Telecommunications, Inc. and Time Warner)
Telecom of the Mid-South, L.P. Pursuant to)
Section 252(b) of the Telecommunications Act of)
1996)
)
Petition for Arbitration of ITC^DeltaCom)
Communications, Inc. with BellSouth) Docket No. 99-00430
Telecommunications, Inc., Pursuant to the)
Telecommunications Act of 1996)
)
Petition of NEXTLINK Tennessee, LLC for)
Arbitration of Interconnection Agreement with) Docket No. 98-00123
BellSouth Telecommunications, Inc.)

**RESPONSE TO BELLSOUTH TELECOMMUNICATIONS, INC.'S
MOTION FOR CLARIFICATION**

Time Warner Telecom of the Mid-South, L.P., ITC^DeltaCom Communications, Inc., and
NEXTLINK Tennessee LLC (collectively, the "Respondents") submit the following brief in
opposition to the "Motion for Clarification" filed by BellSouth Telecommunications, Inc.
("BellSouth") in each of the three, above-captioned arbitration decisions.

INTRODUCTION

Although characterized by BellSouth as a "Motion for Clarification," the carrier's
request would be more accurately described as a Petition to Reconsider. In each of the
Respondents' arbitration proceedings, the TRA has orally announced that BellSouth should pay

reciprocal compensation for ISP-bound telephone calls as an interim solution "pending completion of the FCC 's rulemaking" on the ISP issue. The agency did not, however, order any type of retroactive "true up" of reciprocal compensation rates. Assuming, as BellSouth apparently does, that the FCC will eventually fix a federally mandated, reciprocal compensation rate for ISP traffic, BellSouth asks that the TRA reconsider its decision and require that the federal rate be applied retroactively to the Respondents as soon as the rate becomes legally effective. For the reasons explained below, the Respondents oppose BellSouth 's request.

ARGUMENT

I. Until the FCC adopts a nationwide, reciprocal compensation rate, it would be premature for the TRA to decide when and how the rate is to be applied to pre-existing interconnection agreements.

A. Although not mentioned in BellSouth 's motion, the FCC 's decision announcing that it will begin a rulemaking to fix an "interstate" reciprocal compensation for all ISP traffic has been vacated by the United States Court of Appeals and remanded to the agency. *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1 (D.C. Cir., 2000). In light of the Court 's highly skeptical description of the FCC 's jurisdictional claims, it is questionable whether the FCC will ever be able to fix a federal, reciprocal compensation rate that will survive judicial review. In these circumstances, it hardly makes sense for the TRA to presume that such a rate will be established. It makes even less sense to declare now that the FCC 's rate should become effective in Tennessee before it has been reviewed again by the Court of Appeals.

B. Even if the FCC eventually sets a federal rate, no one knows whether the FCC rate will preempt state-approved rates or how the federal rate will affect existing interconnection

agreements. At one extreme, the FCC may decide to fix a federal rate, preempt all existing interconnection agreements, and order prospective adjustments to offset any over or under collections (*i.e.*, a "true-up") resulting from state regulatory decisions. At the other extreme, the FCC might simply delegate the fixing of reciprocal compensation rates to state arbitrators subject only to federal court review. Multiple alternatives lie between. Once the FCC issues its opinion, the TRA will be able to make a meaningful decision about how the federal rule should be interpreted and applied. Assuming that the TRA is granted some discretion in applying the FCC's rule, it would be foolish for the agency to issue a decision in May, 2000, binding the agency regarding the interpretation of a federal rate that may (or may not) be issued months, or even years, from now.

II. Unlike BellSouth, which still retains monopoly power in many areas and markets, competitive local exchange carriers cannot make "true-up" payments to BellSouth and recoup those expenses by raising rates to captive customers. A true-up requirement in this case could have an anti-competitive impact on CLECs, especially smaller, newer carriers.

CLECs rates are, of course, driven both by the costs of providing service and by market conditions. If a CLEC's underlying cost of providing service to a customer is \$20 a month, the CLEC presumably fixes its rates to cover that cost. But if, two years from now, the CLEC is retroactively assessed additional charges for providing that service, the CLEC cannot recover that charge from the customer nor can it recoup the loss from other customers, as a monopoly provider could do.

Furthermore, a retroactive true-up provision that could materially affect a carrier's financial condition would increase the carriers' risk, deter investors, and dampen the carrier's

ability to raise capital. This would particularly hurt smaller, newer carriers but would presumably have little impact on BellSouth.¹

III. Finally, although the Directors are considering this matter as arbitrators under the federal Telecommunications Act, it is far from certain whether the Directors have the legal power to order retroactive rate adjustments absent the agreement of the affected carriers. Under state law, the TRA clearly has no such authority. See *South Central Bell v. Tennessee Public Service Commission*, 675 S.W.2d 718 (Tenn. Ct. App., 1984). Any attempt to derive such power solely from the federal Act would raise an additional but unnecessary legal dispute and likely invite judicial review.

IV. BellSouth's arguments for a true-up are not persuasive, and, in two respects, appear to be misleading.

A. BellSouth argues (at 4) that "every other state commission in BellSouth's region" that has ordered the payment of reciprocal compensation for ISP traffic has also ordered a retroactive true-up based on an anticipated ruling by the FCC. BellSouth identifies those states as Alabama, Georgia, Kentucky, and North Carolina.² BellSouth also states in footnote 1 that the Florida Commission has ruled that "ISP traffic is interstate in nature for which reciprocal compensation should not be paid during the pendency of the FCC's rulemaking."

¹ This may have been one of the reasons the TRA made no provision for a retroactive true-up of UNE rates in docket 97-01262. That proceeding, now in its third year, could have a substantial, prospective impact on telephone rates in Tennessee. If the new UNE prices were retroactively applied back to 1996, one suspects that even BellSouth would object to such a large and unfair exercise in retroactive ratemaking.

² Each of those state decisions cited by BellSouth was issued before the Court of Appeals vacated the FCC's order claiming jurisdiction over ISP-bound calls.

That statement is inaccurate. In several recent arbitration decisions, the Florida Commission has ordered BellSouth to continue paying reciprocal compensation for ISP traffic pursuant to the parties' prior interconnection agreements until such time as the FCC issues a ruling. There is no provision in Florida for a retroactive true-up.

BellSouth is, of course, well aware of these Florida rulings. During the same week that BellSouth filed its "Motion for Clarification" in Tennessee stating that Florida had not ordered the payment of reciprocal compensation for ISP traffic, another BellSouth attorney filed a brief with the Florida Commission accurately stating that Florida has ordered such payments. The brief states (at page 5, footnote 1):

BellSouth does not agree that reciprocal compensation should be paid for traffic to ISPs. However, this Commission has concluded otherwise in a series of decisions interpreting BellSouth's interconnection agreements with various ALECs. These decisions, coupled with recent arbitrations in which the Commission has directed the parties to continue operating under the reciprocal compensation provisions of their existing agreements on an interim basis, have the practical effect of obligating BellSouth to pay reciprocal compensation for ISP traffic in Florida for the foreseeable future. (Emphasis added).

Copies of the relevant pages are attached.

B. If the TRA is, in fact, granted any discretion in how it will apply a hypothetical federal rate for ISP traffic, BellSouth's request that the TRA implement the FCC rule on the date it becomes effective C rather than following judicial review C is inconsistent with language that BellSouth itself has insisted be included in the interconnection agreement with ITC^DeltaCom . That language, drafted by BellSouth and included in the carrier's template interconnection agreement (Section 16.4) states that future legal and regulatory decisions cannot change the terms

of the agreement until those decisions become "final and non-appealable." The full section states:

In the event that any **final and nonappealable** legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of ITC^DeltaCom or BellSouth to perform any material terms of this Agreement, ITC^DeltaCom or BellSouth may, on thirty (30) days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the Dispute shall be referred to the Dispute Resolution procedure set forth in Section 11. (Emphasis added).³

BellSouth, in effect, now asks the TRA to carve out an exception to Section 16.4 regarding the issues of reciprocal compensation. It is, of course, too late for BellSouth to raise new arbitration issues. Furthermore, it is disturbing that BellSouth would propose language in an agreement and then try to persuade the TRA to change the effect of that language as it applies to one issue without informing the agency of the inconsistency.

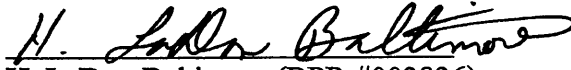
Having reluctantly accepted BellSouth's "final and non-appealable" language, ITC^DeltaCom finds it dismaying, to say the least, that BellSouth would try to evade the consequences of that language as soon as it becomes apparent that the provision might work against BellSouth's interests.

CONCLUSION

For these reasons, BellSouth's "Motion for Clarification" should be denied.

³ This language was included in Exhibit A to the ITC^DeltaCom arbitration petition. The fact that Section 16.4 is not highlighted indicates that the parties had negotiated and accepted this language prior to the June 11th filing of the ITC^DeltaCom arbitration petition.

Respectfully submitted,

A handwritten signature in black ink, reading "H. LaDon Baltimore". The signature is fluid and cursive, with the first name "H." being small and the last name "Baltimore" being larger and more prominent.

H. LaDon Baltimore (BPR #003836)

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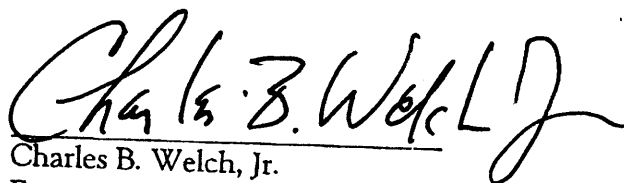
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Counsel for Time Warner Telecom of Mid-South

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail, postage prepaid, to the following on this the 15th day of May, 2000, to:

Guy Hicks
BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300


H. LaDon Baltimore

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:) **Docket No. 990750-TP**
)
Petition for Arbitration of ITC^DeltaCom)
Communications, Inc. with BellSouth)
Telecommunications, Inc. pursuant to the)
Telecommunications Act of 1996.)
 _____) **Filed: April 24, 2000**

REPLY MEMORANDUM IN SUPPORT OF
BELLSOUTH TELECOMMUNICATIONS, INC.'S
MOTION FOR RECONSIDERATION

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Reply Memorandum in support of its motion seeking reconsideration of three aspects of Order No. PSC-00-0537-FOF-TP issued by the Florida Public Service Commission ("Commission") on March 15, 2000 ("March 15 Order"). Notwithstanding the contrary arguments by ITC^DeltaCom Communications, Inc. ("DeltaCom"), BellSouth has met the standards for reconsideration, and the Commission should reconsider its findings concerning: (1) the appropriate reciprocal compensation rate; (2) whether BellSouth is providing unbundled network elements so as to allow DeltaCom "a meaningful opportunity to compete"; and (3) the application fee for cageless physical collocation.

II. DISCUSSION

A. BellSouth's Motion Meets The Standard For Reconsideration

BellSouth's Motion for Reconsideration is not asking the Commission "to re-weight the evidence presented at the hearing." DeltaCom Response at 1. Nor is BellSouth seeking "a second hearing on the same contentions" presented at the arbitration. *Sentinel Star Express Co. v. Florida Public Service Commission*, 322 S.2d 503, 505 (Fla. 1975). Rather, BellSouth is seeking

BellSouth customers to customers served by the ALEC industry rather than visa versa. Thus, while the \$.009 rate would be "reciprocal" in the sense that it would be paid both by BellSouth and ALECs, the amount of traffic against which the rate is to be applied is not.¹

DeltaCom's reference to the recent D.C. Circuit decision in *Bell Atlantic Telephone Companies v. FCC*, 2000 WL 273383 (D.C. Cir., March 24, 2000), is curious, since this case has absolutely nothing to do with the issues presently before the Commission. DeltaCom Response at 4. In that case, the D.C. Circuit vacated and remanded the FCC's Declaratory Ruling in CC Docket 96-98 and Notice of Proposed Rulemaking in CC Docket 99-68, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 3698 (1999), because, according to the Court, the FCC had not adequately explained its conclusion that calls to an ISP do not terminate at the ISP's local point of presence but instead at a distant website. However, the D.C. Circuit's opinion in no way alters the Commission's legal obligation in this arbitration to adopt reciprocal compensation rates that are cost-based in accordance with the 1996 Act and the FCC's pricing rules. Thus, the D.C. Circuit's recent decision is hardly "supportive" of the Commission's decision to adopt a reciprocal compensation rate that does not comply with these legal standards.

As an alternative to adopting existing Commission-approved reciprocal compensation rates, BellSouth has proposed that the \$.009 rate be an interim rate subject to true-up once the Commission establishes new rates in Docket No. 990649-TP. DeltaCom objects to the Commission's doing so because, according to DeltaCom, it is not clear what reciprocal

¹ BellSouth does not agree that reciprocal compensation should be paid for traffic to ISPs. However, this Commission has concluded otherwise in a series of decisions interpreting BellSouth's interconnection agreements with various ALECs. These decisions, coupled with recent arbitration decisions in which the Commission has directed the parties to continue operating under the reciprocal compensation provisions of their existing agreements on an interim basis, have the practical effect of obligating BellSouth to pay reciprocal compensation for ISP traffic in Florida for the foreseeable future.